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10/743,455

12/23/2003

Jean De Rigal

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EXAMINER

PACKARD, BENJAMIN J

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JEAN DE RIGAL,  
NICOLAS SOISTIER, and HOJUNG LEE

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Appeal 2009-014644  
Application 10/743,455  
Technology Center 1600

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Before TONI R. SCHEINER, LORA M. GREEN, and  
FRANCISCO C. PRATS, *Administrative Patent Judges*.

SCHEINER, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants appeal under 35 U.S.C. § 134 from the final rejection of claims 1-15 and 34-38, directed to a cosmetic composition. The claims have been rejected as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

#### THE CLAIMED INVENTION

Claim 1, reproduced in Appendix A of Appellants' Brief on Appeal, claims a foundation cosmetic composition comprising, in a physiologically acceptable medium, at least one coloring agent having a yellow or orange coloration and having a significant reflectance in the range from 550 to 675 nm; and reflective particles - where the composition has a reflectance ranging from 10 to 45% in the range from 600 to 680 nm, and a homogenization power  $1/\Delta E_1$  and a covering power  $1/\Delta E_2$  falling within specific ranges when the composition is applied, according to the value of its lightness  $L^*$ , to particular contrast cards as detailed in Appendix A.

#### ISSUE

The Examiner rejected the claims under 35 U.S.C. § 103(a) as unpatentable over Bourjois<sup>2</sup> in view of MacFarlane.<sup>3</sup>

The issue raised by this rejection is whether the Examiner has established a rational basis for concluding that it would have been obvious to formulate a cosmetic composition with the specific combination of physical characteristics required by the claims.

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<sup>2</sup> French Patent 2 178 441, issued November 9, 1973 to Bourjois et al. All references herein are to the English language translation.

<sup>3</sup> U.S. Patent 5,313,267, issued May 17, 1994 to MacFarlane et al.

## FINDINGS OF FACT

Bourjois discloses a “device enabling one to determine the aesthetic correction and treatment . . . to be applied to a face” (Bourjois 1).

[T]he device . . . entails a number of images representing different shapes of faces or parts of faces and a number of transparent images, each of which is associated with and can be superimposed on one of the preceding ones and represents the make-up corrections that need to be applied to the corresponding face or part.

. . .

The make-up corrections borne by the transparent images indicate the site and the shape of the zones to be made up. They also indicate the make-up hues that need to be used. Each of these hues can have a number of shades which are determined furthermore as a function of the color of the skin and of the eyes, the nature of the skin, etc...

(*Id.* at 2.)

MacFarlane discloses:

[A] method and instrument for identifying categories of skin coloration for compatibility with colors of clothing, makeup, etc., and more particularly to methods and apparatus for classifying skin color based upon its blue and yellow undertones and for assigning one of a plurality of basic categories for which compatible colors have been selected.

(MacFarlane, col. 1, ll. 19-25.)

Neither Bourjois nor MacFarlane discloses a cosmetic composition of any kind.

## DISCUSSION

“During [patent] examination, the examiner bears the initial burden of establishing a *prima facie* case of obviousness.” *In re Kumar*, 418 F.3d 1361, 1366 (Fed. Cir. 2005). “[R]ejections on obviousness grounds cannot

be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

The Examiner characterized the present claims as requiring nothing more than “a physiological/cosmetic acceptable medium, yellow or orange coloration, and reflective particles” (Ans. 6), with “functional language which provides various properties of the foundation cosmetic composition when applied to a contrast card” (*id.* at 5). The Examiner concluded that

It would have been obvious to have formulated cosmetics having an optimal combination of physical characteristics (homogenization power, covering power, etc.) for a given shade selected by the device of the primary reference, based on color characterization using skin color as the exclusive determining factor as taught by the secondary reference.

(Ans. 4.)

The Examiner’s rejection is essentially a conclusory statement lacking a rational underpinning. As correctly noted by Appellants, “the applied references fail to disclose any compositions meeting any of the limitations of claims 1 and 2, much less the combination of features recited in any of claims 1-15 and 34-48” (Reply Br. 7). Nor has the Examiner directed us to any other credible evidence that a person having ordinary skill in the art would have arrived at the specific combination of physical characteristics required by the claims from the teachings of the prior art or from generally known considerations.

Appeal 2009-014644  
Application 10/743,455

### CONCLUSION

We reverse the Examiner's rejection of claims 1-15 and 34-38 under 35 U.S.C. § 103(a) as unpatentable over Bourjois and MacFarlane.

REVERSED

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